

N.A.S.D. FINAL ORDER

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Jeffrey R. Kuklinski
Kemper Securities, Inc. and

94-00864

Name of Respondent

B.C. Ziegler and Company

BACKGROUND

On May 23, 1994, in accordance with the NASD Code of Arbitration Procedure, a decision on the Claim asserted against B.C. Ziegler in this matter was issued by the undersigned arbitrators. That interim award is attached hereto and incorporated in this Final Order by reference. This Final Order addresses the issues contained in the Counterclaim of B. C. Ziegler.

CASE INFORMATION

The Statement of Claim consisting of the Complaint and Answer in Case No. 94CV41 filed in the State of Wisconsin, Washington County Circuit Court was filed with the National Associations of Securities Dealers, Inc. ("NASD") on March 11, 1994.

A Supplemental Statement of Claim was filed with the NASD on March 11, 1994.

Claimant, Kemper Securities, Inc.'s Submission Agreement was signed on March 8, 1994 by A. Brad Busscher, Esq. Vice President and Senior Attorney. Jeffrey R. Kuklinski's Submission Agreement was signed on March 8, 1994.

A Statement of Answer and Counterclaim was filed by Respondent B. C. Ziegler and Company on April 25, 1994.

Respondent, B. C. Ziegler and Company did not file an executed Submission Agreement with the NASD, but is required to arbitrate this dispute pursuant to Section 8 of the NASD Code of Arbitration Procedure and by Orders of the court in Washington County, Wisconsin entered on January 21, 1994 and March 7, 1994 by Judge Warren A. Grady.

Kemper and Kuklinski filed a reply to the counterclaim of B. C. Ziegler with the NASD on May 4, 1994.

Respondent B. C. Zielger filed an amendment to its Counterclaim with the NASD on July 14, 1994, after the appointment of the arbitration panel. The panel granted the amendment pursuant to Section 39 (b) of the NASD Code of Arbitration Procedure.

Kemper and Kuklinski filed a reply to the amended Counterclaim of B. C. Ziegler with the NASD on August 2, 1994.

HEARING INFORMATION

A bifurcated hearing, addressing Claimants' claim only, took place on May 10, 1994 for two (2) hearing sessions and on May 11, 1994 for two (2) hearing sessions. The hearing location was Milwaukee, Wisconsin.

Pre-hearing conferences, addressing discovery issues relative to B. C. Ziegler's Counterclaim only, took place on September 9, 1994 and on September 13, 1994. Each of these pre-hearing conferences lasted for one hearing session and were presided over by the Chairperson, Terry F. Peppard, Esq.

CASE SUMMARY

Claimants, Kemper Securities, Inc. ("Kemper") and Jeffrey R. Kuklinski ("Kuklinski") alleged in their Supplemental Statement of Claim that Respondent, B. C. Ziegler and Company ("B.C. Ziegler") was attempting to enforce an unenforceable restrictive covenant in the contract of employment entered into by and between Kuklinski and B. C. Ziegler when Kuklinski was employed by B. C. Ziegler. Kemper and Kuklinski alleged that the restrictive covenant was overbroad, burdensome and unenforceable and that B. C. Ziegler had violated Section 4.035 of the Wisconsin Administrative Code which required B. C. Ziegler to provide within 15 days of receipt of a written request, photocopies of the agent's customer securities holding records as may be requested by an agent within 30 days of the date of termination of his or her employment with the broker-dealer.

B. C. Ziegler alleged that the employment agreement entered into by and between Kuklinski and B. C. Ziegler contained a short-term covenant not to compete and that the covenant was not unduly restrictive as voiced by Kemper and Kuklinski. B. C. Ziegler alleged that it complied with Wisconsin law by providing Kuklinski with all customer holding records it was required to do so under an Administrative Order of the Wisconsin Securities Commissioner waiving compliance with rule 4.035 of the Wisconsin Administrative Code.

B. C. Ziegler counterclaimed against Kuklinski for breach of contract, against Kemper for tortious interference with contract and for an accounting of all business done with Kuklinski's clients obtained while in the employment of B. C. Ziegler.

Kemper and Kuklinski answered the counterclaim and denied the allegations contained in it.

B. C. Ziegler filed an amended counterclaim alleging that Kuklinski had violated his employment agreement with B. C. Zielger in that Kuklinski printed, at his own expense, business cards that did not mention B. C. Ziegler, and distributed these cards to approximately 1,900 B. C. Ziegler customers through a mailing paid for by B. C. Ziegler. B. C. Ziegler further alleged that Kuklinski distributed these business cards to give these customers an avenue to contact him after leaving B. C. Ziegler for the express purpose of doing business in violation of the employment agreement. Additionally, B. C. Ziegler alleged that Kuklinski and Kemper made numerous telephone and mail solicitations of B. C. Ziegler customers including a mass mailing to approximately 400 individuals.

Kuklinski and Kemper answered the counterclaim and denied that any of the actions described in B. C. Zielger's amended Counterclaim constituted a breach of Kuklinski's employment agreement with B. C. Zielger. Kuklinski and Kemper further stated that all of the contacts with B. C. Ziegler customers were allowable under the terms of the employment agreement, and were not solicitations.

RELIEF REQUESTED

B. C. Ziegler requested the following:

1. That the claim be dismissed on its merits.
2. That an accounting, as requested in Count III of B. C. Ziegler's Counterclaim, be provided by both Claimants.
3. That an award be entered in favor of B. C. Ziegler on its counterclaims, jointly and severally against Kemper and Kuklinski, in an amount to be determined between \$200,000 and \$500,000 as compensatory damages based on the amount of past and future business that is likely to be diverted from B. C. Ziegler by reason of all acts and omissions of Kemper and Kuklinski that are in violation of the Employment Agreement and the Temporary Restraining Order issued by the Wisconsin

Circuit Court.

4. That an award be entered in favor of B. C. Ziegler against Kuklinski in the sum of \$50,000 as and for punitive damages based on Kuklinski's intentional, wanton and willful conduct as set forth in Counts I and III of the amended Counterclaim.
5. That an award be entered in favor of B. C. Ziegler against Kemper in the sum of \$200,000 as and for punitive damages based upon its intentional, wanton, willful conduct as set forth in Counts II and III of the amended Counterclaim.
6. That B. C. Zielger be awarded its attorney's fees, filing fees and costs in this proceeding.

Kuklinski and Kemper requested the following:

1. That B. C. Zielger's amended counterclaims be dismissed with prejudice.
2. That Kuklinski and Kemper be awarded their attorney's fees, filing fees, costs and disbursements and any other relief deemed just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

Prior to the hearing on B. C. Ziegler's Counterclaim, the NASD was advised that B. C. Ziegler had entered into a separate settlement agreement with Kemper and Kuklinski in full and final resolution of the issues contained in B. C. Ziegler's Counterclaim.

FINAL ORDER

Without need for a hearing on B. C. Ziegler's Counterclaim, the undersigned arbitrators enter this final order in full and final resolution of the issues submitted for determination as follows:

1. The Interim NASD Award on the claim asserted by Kemper and Kuklinski against B. C. Ziegler is hereby attached and incorporated into this Final Order by reference.
2. Kemper and B. C. Ziegler shall each pay one half of the forum fees for the two Pre-Hearing Conferences held on September 9, 1994 and September 13, 1994.

FORUM FEES

Forum Fees relative to the adjudication of Kemper and Kuklinski's claim against B. C. Ziegler were assessed in the Interim NASD Award which is hereby incorporated into this Final Order by reference.

Pursuant to §44(c) of the NASD Code of Arbitration Procedure, the following additional Forum Fees are assessed for the pre-hearing conferences to adjudicate discovery issues relative to B. C. Ziegler's counterclaim against Kemper and Kuklinski. Additional Forum Fees in the amount of \$300.00 are assessed against Kemper and additional Forum Fees in the amount of \$300.00 are assessed against B. C. Ziegler.

Forum fees are payable to the National Association of Securities Dealers, Inc.

By The Arbitration Panel:

Dated:

October 6, 1994

/s/ Terry F. Peppard
Terry F. Peppard, Esq.
Presiding Chair,
Industry Arbitrator

October 10, 1994

/s/ H. Michael Spence
H. Michael Spence, Esq.
Industry Arbitrator

October 7, 1994

/s/ Robert F. O'Keef
Robert F. O'Keef
Industry Arbitrator

Date Final Order Served By The NASD: October 20, 1994